



SJA UPDATE

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REVISIONS TO "DON'T ASK, DON'T TELL" REGULATIONS

1. Introduction. The "Don't Ask Don't Tell" law, 10 U.S.C. § 654, is implemented by two Department of Defense (DoD) regulations: DoD Instruction 1332.14 ("Enlisted Administrative Separations") and 1332.30 ("Separation of Regular and Reserve Commissioned Officers"). The Secretary of Defense has approved revisions to these two regulations in consultation with the Military Services and the Joint Chiefs of Staff. The changes are intended to implement 10 U.S.C. § 654 in a fairer and more appropriate manner by providing greater protections to Service members whose homosexual conduct is involuntarily disclosed. The changes are **effective today and apply to all open and future cases**. The changes do not provide recourse to separated Service members. As questions from the fleet will no doubt arise immediately, it is imperative that all judge advocates understand the new policy.

2. Discussion

a. Revisions have been made to the previous policy to raise the level of the commander authorized to initiate inquiries and separation proceedings regarding homosexual conduct, revise what constitutes "credible information," and specify certain categories of information that cannot be used for purposes of homosexual conduct discharges.

b. Specifically, the changes:

- Raise the level of the officer who is authorized to initiate a fact-finding inquiry or separation proceedings regarding homosexual conduct to a general or flag officer in the Service member's chain of command.
- Raise the level of the person who conducts a fact-finding inquiry regarding homosexual conduct to the level of O-5 or above.
- Raise the level of the officer who is authorized to separate an enlisted Service member for homosexual conduct to a general or flag officer in the Service member's chain of command.
- Revise what constitutes "credible information" to initiate an inquiry or separation proceeding by, for example, specifying that information provided by third parties should be given under oath, and by discouraging the use of overheard statements and hearsay. Credible information exists when:
 - A Service member states to a person of senior grade and authority within his or her chain of command that he or she is

- homosexual or bisexual, or words to that effect; or
- A reliable person states, under oath, that he or she observed a Service member engage in, attempt to engage in, or solicit another to engage in a homosexual act or acts; or
- A reliable person states, under oath, that he or she was told by a Service member that he or she is a homosexual or bisexual, or words to that effect; or
- A reliable person states, under oath, that a Service member has married or attempted to marry a person known to be of the same biological sex.
- Revise what constitutes a “reliable person,” upon whose word an inquiry can be initiated, with special scrutiny on third-parties who may be motivated to harm the Service member. A “reliable person” is defined as someone who would be expected, under the circumstances, to provide accurate information. Examples of a person who may *not* be a “reliable person” are:
 - A person with a prior history of untruthfulness or unreliability; or
 - A person with a motive to seek revenge against or to cause personal or professional harm to the Service member specifically, or to cause personal or professional harm to persons suspected of being homosexual generally; or
 - A person with a prior history of conflict with the Service member.
- Specify certain categories of confidential information that will not be used for purposes of homosexual conduct discharges:
 - Information considered privileged pursuant to Rule 502 (“Lawyer-client privilege”), Rule 503 (“Communications to clergy”), or Rule 513 (“Psychotherapist-patient privilege”) of the Military Rules of Evidence;
 - Information provided by the Service member to a medical professional in furtherance of medical treatment or a public health official in the course of a public health inquiry;
 - Information provided by the Service member in the course of seeking professional assistance for domestic or physical abuse sustained by the Service member or by a member of his or her household;
 - Information about sexual orientation or conduct obtained in the course of security clearance investigations, in accordance with DoD 5200.2-R (“Department of Defense Personnel Security Program”).

c. These revisions **take effect immediately and apply to all open and future cases.** The Services have 30 days to amend implementing regulations. Accordingly, revisions to MILPERSMAN 1910-148 (“Separation by Reason of Homosexual Conduct”) and Enclosure (3) to SECNAVINST 1920.6C

(“Administrative Separation of Officers”) will be forthcoming.

3. Conclusion. All hands must understand the new policy on homosexual conduct in the Navy. Additional guidance will be provided as circumstances warrant.

4. Points of Contact. Points of contact for questions are CDR (b) (6) at (703) 614-(b) (6) DSN: 224-(b) (6) (b) (6) @navy.mil or LT (b)(6) at (703) 614-(b)(6) DSN: 224-(b)(6) (b)(6).